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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
	)	
Implementation of Section 255 of the Telecommunications Act of 1996	)	
	)	WT Docket No. 96-198
Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities	)	

COMMENTS OF THE MULTIMEDIA TELECOMMUNICATIONS ASSOCIATION

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COMMENTS OF THE MULTIMEDIA TELECOMMUNICATIONS ASSOCIATION

Pursuant to the Commission's Notice of Proposed Rulemaking ("Notice") in Docket No, 96-198, released April 20, 1998, Multimedia Telecommunications Association ("MMTA") hereby respectfully submits its comments regarding the Commission's proposed implementation of Section 255 of the Telecommunications Act ("Act").

STATEMENT OF INTEREST

MMTA is a national trade association of manufacturers, suppliers, distributors, retailers and users of customer-premises business telecommunications systems. Founded in 1970 as the North American Telephone Association ("NATA"), MMTA acquired its present name in 1995, when it reorganized to reflect a broadened focus on the diversity of technologies and media now available to business telecommunications users. In 1997,

MMTA became affiliated with the Telecommunications Industry Association ("TIA").[1] MMTA exists to promote competitive markets and healthy sales and support channels for users of business communications products and services. An active participant in regulatory proceedings affecting CPE markets, MMTA supports regulatory policies that promote fair competition in the telecommunications equipment and services distribution marketplace.

Many MMTA members are actively involved in manufacturing and supplying telecommunications equipment that promotes accessibility. In addition to specific efforts to add accessibility features to telecommunications products, the business telecommunications equipment industry has contributed indirectly to promoting accessibility by developing products targeted at particular market segments that have similar characteristics to some disabled equipment users. One important market segment that may lead to significant advances for accessibility advances is the area of computer-telephone integration ("CTI"). See Section V.

Individual members of MMTA also participate actively in the work of accessibility-focused organizations, including standards bodies, such as ANSI and TIA, and other groups such as the Association of Access Engineering Specialists. In conjunction with TIA, MMTA supports the Electronic Industries Foundation's activities on behalf of enhancing accessibility of telecommunications equipment and services.

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[1] MMTA generally concurs in the thrust of the comments filed in this proceeding today by TIA. MMTA's separate comments are intended to highlight issues of particular importance to MMTA's membership; i.e., to manufacturers and suppliers of business telecommunications systems.

I. INTRODUCTION AND SUMMARY

In the Notice, the Commission states that "we intend to carry out Section 255 in a practical, commonsense manner." Notice, ¶ 3. The Commission adds that "we must allow industry the flexibility to innovate and to marshal its resources toward the end goal, rather than focusing on complying with detailed implementation rules." Id. A practical, flexible approach that encourages innovation should lead to overcoming many of the accessibility barriers facing disabled individuals. There are undoubtedly a number of measures to improve the accessibility equipment that are "readily achievable" today and that go beyond what has been done in the past.

At the same time, as the Notice recognizes, some accessibility problems are more intractable, and are not easy to resolve, at least using mainstream communications products. In addition to the important interest in improving accessibility for the disabled, there are legitimate interests in preserving a regulatory environment that encourages innovation, in minimizing cost burdens that are ultimately borne by all equipment consumers, and in focusing available resources on achievable objectives. Balancing these interests, Congress directed industry to make serious efforts, which MMTA supports, to solve those problems for which solutions are "readily achievable," but did not require industry to address accessibility problems that are not easy to solve or that entail significant difficulty or expense.

Given the unlimited number of disability-related issues that potentially might be addressed, the Commission should adopt rules that assist industry in directing its limited resources towards those disability-related problems that are (1) widespread enough to have

benefits that justify the effort, and (2) likely to have a useful solution that is readily achievable, The worst thing the Commission could do would be to entangle industry in a web of endless "achievability" assessments, compliance reviews, paperwork, and litigation concerning business judgments of manufacturers, and thereby to prevent the attainment of objectives that are within reach.

The Commission should recognize that each individual company necessarily will have to set priorities for accessibility in order to effectively manage its limited design resources and to guide its assessment of what is readily achievable with the limited resources available. This is a particular issue for the business equipment industry because of the numerous types of products and features involved in business telecommunications systems. Manufacturers of business equipment necessarily will have to set priorities among numerous types of systems, system components, and associated features, and among the 18 criteria on the Access Board's "checklist," in order to judge which subset of accessibility issues it is "readily achievable" to address. These judgments will be made based on a variety of factors that come into play for a particular manufacturer at a particular time. Thus, there is little to be gained by trying to second-guess a manufacturer's decision on one particular accessibility issue, in isolation from the manufacturer's overall accessibility efforts.

Instead of trying to address particularized '"achievability" assessments through a complaint process, the Commission should focus on stimulating market forces to encourage productive work on accessibility design. Private sector groups should be encouraged to create accessibility "checklists" that permit rating of disability-accessible products. A checklist and market-based rating system will provide guidance from the

community of users most affected by manufacturers' business judgments, and will thereby create the most effective incentives for manufacturer compliance.

The Commission should craft its rules in a manner that reflects the Congressional intent behind Section 255: to promote accessibility, but not mandate it in all circumstances. To that end, the Commission should consider a manufacturer's overall efforts to incorporate accessibility into products in determining whether there has been a violation of Section 255. Under this approach, a manufacturer who has made a good faith effort to consider accessibility issues in the design of some products should not be considered to have violated Section 255. Only if the manufacturers' pattern of behavior demonstrates that the manufacturer has made no meaningful effort to consider accessibility should the Commission find a violation of Section 255.

The Commission's rules on responses to informational inquiries and complaints should reflect this basic approach. First, most of the "complaints" that are filed with the Commission will in fact be requests for information, and will not provide any basis for suspecting violations of Section 255. In such cases, a manufacturer should not be required to make a report to the Commission, because the Commission need not be involved in matters that are information-related only. Free flow of information regarding accessible products clearly goes hand-in-hand with the concept of accessibility and Section 255. MMTA believes that the private sector, not the Commission, should establish the information clearinghouse for disability-accessible products.

Second, the Commission must set thresholds for complaints that allow industry to move forward and avoid diversion of resources to address unproductive litigation. Otherwise, those problems that do have a readily achievable solution are likely to be lost in a flood of complaints about problems to which there is no readily achievable solution. The relevant standard should be whether the manufacturer has a pattern of avoiding any effort to address what is "readily achievable." In deciding complaints, the Commission should not require the manufacturer to show why an accessibility feature described in a complaint is ***not*** readily achievable. Placing such a burden on manufacturers is not in accordance with the language of the statute. In addition, it is not in accordance with the Commission's stated intent to free industry, as well as consumers, "to apply their resources to solving access problems, rather than subjecting them to burdensome procedural requirements." Notice, ¶ 124. Given the inherently subjective and context-specific nature of "readily achievable" assessments, the Commission should not attempt to second-guess a manufacturer's assessments unless there is evidence of willful non-compliance with Section 255.

Third, a business telecommunications equipment manufacturer should not be subject to complaints that have not been raised initially with the complainants' employer. The employer is the customer in the business equipment context. It is unfair and counter-productive to put manufacturers in the position of addressing complaints which are in fact disputes about reasonable accommodation that are actually only resolvable between the disabled individual and his/her employer.

Fourth, the Commission should not require a response to each complaint within five days. A meaningful five-day response will rarely, if ever, be feasible, except perhaps where the manufacturer has already considered the issue raised by the complaint, and has provided a solution. Where the manufacturer has not already provided a solution, it is very unlikely that a meaningful response can be provided within five days. The Commission may require the manufacturer to acknowledge the complaint within a short time period, but should then permit the manufacturer to have a reasonable time for response.

Compatibility between equipment and peripherals is more difficult to achieve in the business systems environment. However, accessibility efforts could benefit if standards can be developed based on recent successes such as CTI. The Commission's rules should recognize that standards require a collective effort, including the participation of peripheral manufacturers.

The Commission's investigation of complaints should take account of the delays that have attended the development of accessibility guidelines and rules implementing Section 255, and the two- or three-year time lag inherent in designing equipment. Finally, the Commission's rules should be consistent with the objectives of the Mutual Recognition Agreement and the equipment streamlining proceeding.

II. THE COMMISSION'S RULES SHOULD ALLOW AND ENCOURAGE MANUFACTURERS TO PRIORITIZE ACCESSIBILITY ISSUES

Section 255(b) of the Act requires manufacturers of telecommunications equipment or customer premises equipment to "ensure that the equipment is designed, developed,

and fabricated to be accessible to and useable by individuals with disabilities, if readily achievable." 47 U.S.C. § 255(b). The "if readily achievable" qualifier contained in Section 255 clearly recognizes that a manufacturer may not always be able to achieve accessibility in all of its product offerings. The Commission's proposal to require manufacturers to incorporate "accessibility" considerations into their design process is consistent with the requirements of Section 255. However, the Commission must also allow manufacturers and private sector organizations ample leeway to prioritize accessibility issues so that they do not overwhelm the product design process.

A. The Commission Should Adopt a Pragmatic Definition of "Accessibility"

The Commission proposes to define "accessible" in terms of "access to the full functionality" of equipment. In the business telecommunications environment, however, individual pieces of equipment are typically part of a complex "business telecommunications system" with many different components. Even in a relatively small system, there are likely to be numerous components. In addition to telephone sets, a basic business telephone system is likely to include a variety of specialized equipment or components, such as attendant consoles, call detail printers, and administration terminals. Many systems have even more specialized components because they are designed for particular applications such as 800-number call centers, hospitals, etc. Each component of the system is typically feature-rich, with numerous programmable functions. Because each feature of each component of each system is reviewable under the Access Board's 18-point checklist, there are a gigantic number of disability issues that potentially could be considered by each manufacturer in the design of business telecom equipment,

Theoretically, a manufacturer with unlimited time and resources could make an "achievability" determination for each feature of each component of each system vis-a-vis each of the 18 accessibility criteria identified by the Access Board. But in reality of course, manufacturers do not have unlimited time and resources. Furthermore, Section 255 does not require manufacturers to incur major costs to achieve accessibility. Therefore, especially in the business environment, it is unrealistic to expect equipment manufacturers to be able to even consider the "achievability" of addressing more than a small fraction of all the conceivable disability issues.

In summary, while a manufacturer must make a reasonable effort to assess the achievability of access improvements, it is unreasonable to assume that a manufacturer will consider 100%, or even a majority of the universe of possible access improvements. The Commission must allow manufacturers to limit the scope of their inquiry into accessibility issues so that the number of issues does not inundate, and ultimately paralyze, the design process. As discussed in Section C. below, the Commission should encourage private sector groups to develop a "core feature checklist," that will enable manufacturers to prioritize among accessibility issues and to limit to a manageable number the issues that will be considered during the product design process.

B. The Definition of "Readily Achievable" Should Recognize That What is Achievable Will Vary for Each Manufacturer Based on Individual Priorities and Resources

On its face, Section 255 does not require manufacturers to make economically unsound business decisions. Section 255(b) requires manufacturers to make a three pronged determination concerning any access enabling feature or function. The three

prongs of the test are: (1) is it easily accomplishable? (2) can it be carried out without much difficulty? and (3) can it be carried out without much expense? The questions raised by this three pronged test are the quintessential marketing questions: What does the market demand that we build? Can we do it? Can we do it and make a profit? If the development and manufacturing cost cannot be recovered through sales, the effort is likely to fail the test of ease, difficulty and expense.

Given the market-oriented nature of the Section 255 test, it follows that the assessment of what accessibility improvements are "readily achievable" for a particular product of a particular manufacturer at a particular time must be an individualized and, to a great extent, subjective judgment. As the Commission recognizes, the determination of what is "readily achievable" for a given product at a given point in time will depend on a variety of factors, including market and life-cycle considerations. Another key factor will be a manufacturer's assignment of priorities among competing accessibility demands. Given the limited resources available to manufacturers for the design of equipment, a manufacturer's decision to incorporate some accessibility features in product design may use up all available resources, so that other accessibility features cannot be accommodated, or even fully considered.

For example, a manufacturer may conclude that it is more important to have accessible station sets than accessible operator consoles, more important to have accessible consoles than accessible administrative terminals, more important to have accessible administrative terminals than accessible central processing units. Within the feature set associated with the station set, the manufacturer may assign the highest priority to call

transfer, next highest to conferencing, next to speed dial, and so on. However, another manufacturer may have different priorities.

The Commission should explicitly recognize, in its definition of "readily achievable," that what is "readily achievable" for a given product or component will vary depending on each manufacturer's resources, marketing focus, and priorities, and that an accessibility feature that would be "readily achievable" standing alone may not be "readily achievable" after other competing accessibility demands have been met. In other words, what is "readily achievable" cannot be considered in isolation, but must be determined within the totality of accessibility issues that are under consideration with respect to all products or product lines under development.

The fact that a particular accessibility function in a particular system component or feature is offered by one manufacturer and not another, or in one product and not another, is an expected result of manufacturers having different resources and priorities. It is not an indication that anyone has violated Section 255.

Because assessments regarding product design and development are to a great extent subjective, because they will vary substantially from manufacturer to manufacturer as a result of differing resources, market orientations, and other factors, and because they depend on each manufacturer's overall assignment of priorities among accessibility issues, it would be counter-productive for the Commission's Section 255 regulatory process to try to second-guess manufacturers' particularized "readily achievable" decisions. This is especially so because any regulatory review of design decisions is likely to occur several years after the

fact. A manufacturer should not be penalized for making, in the Commission's after-the-fact estimation, the "wrong call," unless the manufacturer's decision was obviously unreasonable at ***the time of design***.

C. The Commission Should Rely on Market Mechanisms As the Primary Enforcer of Section 255

As shown above, manufacturers' individual "achievability" assessments of a particular accessibility feature are necessarily individualized, largely subjective and market-based, and generally are not susceptible to regulatory review. It follows that the most appropriate mechanism by which to ensure Section 255 compliance is market-based. The Commission should encourage private sector organizations to use the Access Board's guidelines to develop a "core checklist" for evaluating products in terms of accessibility. By ranking accessibility issues in terms of demand, for particular accessibility functions, system components, in particular, features of products and such a core checklist would assist manufacturers to identify and prioritize accessibility issues when designing products. The public — specifically, equipment purchasers, individuals with disabilities and interested organizations — could evaluate individual products and the manufacturers against the core checklist. For example, the checklist could be included in requests for proposals by large equipment purchases. The publication of a checklist would encourage manufacturers to make their products as accessible as feasible, in order to receive good product and company ratings from the disabled community, sell more products to disabled individuals and their employers and maintain a positive public image. By using the leverage of the market to encourage more effective allocation of manufacturers' design resources, a market-based

checklist approach will enforce Section 255 far more effectively than any regulatory process, while avoiding unnecessary and unreasonable regulatory burdens.

D. Any Regulatory Review of Compliance Should Focus on the Manufacturer's Overall Effort

As demonstrated above, the accessibility functions that are found to be "readily achievable" for any product will depend largely on each manufacturer's individual resources, marketing focus, and priorities. Further, what is "readily achievable" in particular cases cannot be judged in isolation from a manufacturer's overall allocation of resources among competing accessibility demands. Therefore, any regulatory review of a manufacturer's compliance with Section 255 cannot be narrowly focused on one feature, product, or accessibility function.

Rather, the test of whether a manufacturer has violated Section 255 should turn on whether that manufacturer, in its overall "readily achievable" assessments, has made such assessments in accord with the Commission's "good faith effort" guidelines. The Commission should make the overall effort by a manufacturer to consider accessibility in product designs the determining factor of whether there has been a violation of Section 255. A manufacturer who has made a good faith effort to include accessibility considerations in the design of its products not be considered to have violated Section 255,[2] and a finding that a manufacturer has violated Section 255 would be reserved for

[2] A manufacturer would be deemed to have made a "good faith effort" to comply with Section 255 by showing that it had attempted to increase the accessibility of it products by taking some or all of the actions described in ¶ 165 of the Notice.

situations in which there has been a pattern of behavior which demonstrates that the manufacturer has made no real effort to comply with its obligations under Section 255. Such a determination should be made on a company, rather than product-by- product, basis. In the broad sense, access issues are visual, audio or mechanical. If a manufacturer considers access in these three broad areas and makes reasonable efforts to assess ease of accomplishment, level of effort and expense, the manufacturer should be deemed to have complied with the law.

III. THE SECTION 255 COMPLAINT PROCESS

The Commission's rules governing responses to information inquiries and complaints should reflect the substantive principles described in Section II. The rules should encourage free dissemination of information about accessibility of products, and should channel accessibility efforts into current marketplace activity rather than litigation over past equipment design decisions.

A. The Commission Should Distinguish Between Consumer Inquiries and Complaints

In its Notice, the Commission has proposed a "fast-track" process to initially address consumer issues that arise under Section 255 of the Act. Notice, ¶ 125. Under this process, consumers who are dissatisfied with the accessibility of equipment would contact the Commission. The Commission would refer the matter to the manufacturer, who would be required to attempt to solve the consumer's access problem and report back to the Commission within five business days. Id. The Commission would review the response and determine whether there is a possible violation of Section 255.

The Commission's proposal should be modified. As currently formulated, it commingles two processes that serve distinct purposes: (1) providing information and assistance to disabled individuals who are currently trying to find equipment that meets their needs; and (2) "bringing to justice" manufacturers and service providers that failed to comply with Section 25 5. These are two quite different functions. The issues to be addressed and the parties involved in the information-assistance and complaint processes are quite different – especially in the context of business telecommunications systems.

One of the reasons for the mismatch is the "forward-looking" nature of Section 255. Under Section 255, manufacturers must incorporate accessibility in the design of equipment. The steps manufacturers take in the design process, however, will bear fruit only in the future – typically two or three years after the product is initially developed. In the information-assistance process, however, the disabled consumer needs immediate help to solve an accessibility problem, "here and now." While the manufacturer has a role to play in this process, the products that the manufacturer has available to solve that consumer's immediate problem are limited to those products that have ***previously*** been "designed, developed and fabricated" to incorporate accessibility features or to be compatible with accessible peripheral equipment. 47 U.S.C. § 255. The manufacturer generally will not readily be able to provide an accessibility feature that was not incorporated when the product was originally designed or manufactured. Thus, the manufacturer cannot solve the consumer's present-day problem by designing a new product unless the consumer is willing to wait several years. In short, the issue to be addressed in resolving the problems in the "here and now" do not involve whether an

accessibility feature is "readily achievable" (as a matter of equipment design). Instead, the issues involve determining what kind of equipment is ***currently available.*** Where a fully accessible product was not "readily achievable" or is not available at a price that is economical for the employer, substitute products may be used as a means of reasonably accommodating a particular disability, even where the substitute product is a less-than-perfect substitute.

In short, because of the "looking-forward" nature of Section 255 and the soon-to-be-implemented Commission rules regarding Section 255, the Commission's proposal to simply put the manufacturer and the disabled user together to "work it out" informally will not achieve the Commission's intended result — resolution of the matter.

A second area of mismatch is that the information-inquiry process necessarily involves other parties. For example, in addition to the original manufacturer, the retailer that sold the system may be involved. That retailer may have equipment from other manufacturers that meets the consumer's needs. Furthermore, in the business context, solving a consumer's accessibility problem usually involves an even more important player – the disabled individual's employer. It is ultimately the employer who decides what type of equipment will be purchased for the use of employees. Thus, the assumption that Section 255 can be most effectively implemented by bringing about exchange of information between a disabled individual and a manufacturer, simply does not apply to the business context. In that arena, the most important and effective interactions are likely to be between the disabled employee and employer, on the one hand, and between the employer and the equipment retailer, on the other.

Indeed, employers are subject to a separate obligation, under the Americans with Disabilities Act, to make "reasonable accommodations" for employees' disabilities. 47 CFR § 12112(b)(5). Thus, employers already have a duty to seek out, in the marketplace, equipment solutions that "reasonably accommodate" the disabilities of employees or prospective employees. To most effectively implement Section 255 in the business equipment context, the Commission should build on these existing obligations of employers, and seek ways to stimulate the marketplace to respond by providing equipment that reasonably accommodates disabled employees.

In the business equipment context, it is not just the manufacturer and the disabled equipment user factor into the accessibility mix, but also the disabled equipment user's employer and the retailer who sold the employer the telecommunications system, Under the Commission's proposal to bring the manufacturer and the disabled equipment user together for problem-solving, these key people are not part of the discussion, In some cases, the manufacturer may have something to contribute to resolving the consumer's present-day problem, such as substitute equipment that can at least partially accommodate the user's disability, but without the employer present, neither the manufacturer nor the user will be able to get employer approval to implement the substitute mechanism to solve the user's problem.

Relying on the market to solve the "here and now" problems of disabled individuals is more effective than trying to directly intervene to solve the problem by bringing together all the affected parties in a forced information exchange. This is particularly true in the business systems context where so many parties are involved. Accordingly, the Commission

must recognize the distinction between "inquiries" and "complaints," and provide for different treatment of each.

In its Notice, the Commission proposes to provide manufacturer and service provider contact information to consumers. Notice, ¶¶ 126 and 128. To that end, the Commission proposes to require from manufacturers and providers the name or title of the contact person, mailing address, and alternate contact methods (telephone number, TTY number, facsimile number, or electronic mail address). The Commission also proposes to require equipment manufacturers and service providers to establish multiple contact methods, accessible to as many disabilities as possible, that identify all alternatives available. MMTA generally agrees that manufacturers should have points of contact for making information available to individuals with disabilities. However, as discussed above, in the business equipment context the equipment purchaser is the employer, not the ultimate end user. In solving a disability-related problem in this context, the manufacturer's primary contact will be the employer, or retailer, not the consumer. Therefore, it is less likely to be productive for manufacturers of business telecom equipment to spend time and resources setting up systems to accommodate a wide variety of alternate forms of communications with disabled individuals. It should be sufficient for manufacturers to provide the transmission of product information and inquiry requests via the more common forms of communications, such as telephone, facsimile and electronic mail.

B. The Commission Must Establish a Threshold for the Filing of Complaints

Treating consumer inquiries separately from complaints is appropriate for another reason as well. A manufacturer's inability to provide equipment that meets a particular accessibility need does not constitute evidence that the manufacturer is in violation of the Act.[3] Under the Commission's current proposal, a manufacturer's response to an inquiry triggers Commission review of whether the provision of the product is "readily achievable" ***and*** whether the manufacturer involved has an "underlying compliance problem." Opening these issues is appropriate only if there is evidence that a manufacturer has violated the Act by failing to make a good-faith effort to assess what is "readily achievable."

MMTA recognizes that a complaint process is necessary in order to discipline those manufacturers that disregard their Section 255 obligations. However, it is unnecessary and counterproductive to adopt a complaint process that treats every consumer contact with the Commission as a potential complaint.

The Commission should not be expending its resources on investigating individual complaints about whether a particular accessibility feature is "readily achievable" in a particular product. As discussed above, each manufacturer necessarily must determine what is "readily achievable" based on a prioritization of competing demands for various forms of

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[3] Indeed, given the vast number of possible accessibility issues that can arise in the business telecommunications system context, a manufacturer's inability to even consider most of these issues cannot be considered a violation of the Act. Given the costs involved in the design process, it is not "readily achievable" for even large manufacturers to even consider more than a fraction of all possible accessibility demands.

accessibility in particular products and among all the manufacturer's products. Thus, "readily achievable" assessments necessarily will be individualized and even subjective.

Therefore, no useful purpose can be served by complaint investigations that laboriously second-guess, in isolation from each other, a manufacturer's "readily achievable" assessment for particular features and products. Unless a manufacturer has made no good-faith effort to determine which accessibility features are "readily achievable," there can be no legitimate basis for launching intrusive investigations of individual assessments. No manufacturer should be subject to a complaint investigation unless there is evidence that the manufacturer has failed to make any good-faith effort to consider accessibility in the design processes for ***any*** of its products.

Therefore, in order to ensure that the process flows efficiently and doesn't divert energy or resources from valid issues requiring resolution to complaints that lack merit or that could be resolved without Commission intervention, the Commission must establish some basic thresholds to be met by individuals who file actual complaints. Any such standards must also ensure fair treatment of manufacturers and avoid unnecessary and burdensome complaint procedures.

1. General Threshold

The bare allegation that a manufacturer has failed to include a particular "readily achievable" accessibility feature or features should not be sufficient to establish a prima facie case of a Section 255 violation. At a minimum, the complainant should be required to provide evidence indicating that there is reason to believe a feature is readily achievable.

Otherwise, manufacturers will be continually required to prove a negative – i.e., that this or that requested feature is ***not*** readily achievable. This approach contravenes the plain language of Section 255, and also disserves the Commission's stated purpose to permit flexibility in complying with Section 255.

More fundamentally, however, a complaint limited to a single product or accessibility feature should ***not*** be sufficient to state a claim for relief under Section 255. As discussed above, it requires a highly individualized and even subjective decision, on the part of each manufacturer, to decide how to use the limited resources available for designing accessibility features into products. One manufacturer may concentrate its efforts in one area, another may choose to focus on a different area.

No useful purpose would be served by second-guessing each manufacturer's priorities. Accordingly, in response to any complaint about the absence of a particular accessibility feature from a particular product, the inevitable (and entirely sufficient) answer would be: "It wasn't readily achievable for me, because my available resources were focused on other priorities." The complaint process will become a pointless exercise that unnecessarily consumes the available resources of all parties involved.

On the other hand, it ***would*** be appropriate to invoke the complaint process against a manufacturer that has made little or no effort to identify and incorporate ***any*** "readily achievable" features in ***any*** of its products.

In addition, the Commission should require consumers to contact, or indicate an attempt to contact, the relevant manufacturer, as a prerequisite to filing a complaint. As

stated above, the Commission proposes to create a comprehensive list of manufacturers and service providers subject to Section 255. Again, the Commission's goal in establishing such a contact system is to encourage both the flow of information regarding product availability and informal resolution of complaints. By requiring the disabled consumer to contact, or attempt to contact, the manufacturer or service provider as a precondition to filing a complaint, the Commission will balance the needs of both consumers and manufacturers and service providers, as well as reduce the number of complaints received by the Commission. Thus, the Commission will accomplish its dual goal of facilitating informal resolution of issues between consumers and manufacturers and service providers and reserving the complaint process for true complaints.

2. Specific Threshold for Complaints About Business Equipment

The Commission should also require a specific complaint threshold with respect to business equipment. In the case of business equipment, the equipment purchaser is usually the equipment user's employer. Under the Commission's proposal, however, the disabled user would be permitted to file a complaint regarding business equipment at any time, without any prior employer consultation.* The Commission's proposal could lead to the filing of numerous complaints against manufacturers by disabled employees that demand accessibility features never requested from the manufacturer by its customer, the employer.

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[4] In fact, the Notice does not expressly limit the class of complainants to disabled equipment users. To prevent complaints, a general "standing" requirement should be adopted.

Accordingly, the Commission must establish threshold requirements for the filing of complaints regarding business equipment. Specifically, the Commission should require, in the case of business equipment, that a disabled user's business equipment accessibility issue(s) be raised with his or her employer before a complaint against the manufacturer may be filed with the Commission. The manufacturer may or may not have a product that would provide accessibility to the disabled user, but the availability or "achievability" of the product is a moot point if the employer never asks for it. If the employer is not willing to request or purchase an accessibility feature, then the employee's complaint is clearly with the employer, not the manufacturer. On the other hand, if the manufacturer has not designed or developed the product because no employer has requested it,[5] the employee's first recourse should be with the employer. The employer will either need to accommodate the employee by use of another manufacturer's product, a peripheral device, or not at all. It is unfair and counter-productive, however, for the Commission to put manufacturers in the position of defending a complaint that is actually between a disabled user and his or her employer.

[5] Again, manufacturers should not be deemed to have violated Section 255 because they have made legitimate and reasonable business decisions not to manufacture particular accessibility products due to the lack of a market for such products. The Commission clearly cannot penalize manufacturers after the fact for electing not to spend their often limited time and resources developing products that they will have little or no likelihood of selling to a consumer.